No. 171

# In the Supreme Court of the United States

OCTOBER TERM, 1942

UNITED STATES OF AMERICA,
*Petitioner,*

VERSUS

OKLAHOMA GAS & ELECTRIC COMPANY, A CORPORATION,
*Appellee.*

# BRIEF OF APPELLEE

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November, 1942.

UTTERBACK TYPESETTING CO., OKLAHOMA CITY, OKLA.

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## BRIEF OF APPELLEE

The facts in this case were the subject of stipulation (R-8).

In 1926, the State of Oklahoma applied to the Secretary of the Interior

> "To grant permission in accordance with Section 4 of the Act of March 3, 1901, 31 Stat. 1058, 1084, to open and establish a public highway" (R-10).

across the eighty acre trust allotment in question. Section 4 of the Act authorizing such action is as follows:

> "That the Secretary of the Interior is hereby authorized to grant permission upon compliance with such requirements as he may deem necessary to the proper state or local authorities for the opening and establishing of public highways in accordance with the laws of the state or territory in which the lands are situate through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties, but which

have not been conveyed to the allottees with full power of alienation."

The eighty acres in question falls within the latter classification of lands through which the Secretary is authorized to grant permission for the construction of highways, as it is land allotted in severalty to an individual Indian without full power of alienation. (In view of a portion of the argument made by the Government, we ask the court to note in this statute that a specific distinction is made between an *Indian reservation and allotments in severalty*).

After the State's application for permission to construct a highway was approved in 1928 (R-9), the State of Oklahoma in 1936 (R-11), granted to the Oklahoma Gas & Electric Company the right to use the highway (*Title 69, Sec. 57, Okla. Stat. 1941 (see appendix),*) and said Company thereafter erected thereon

"Its rural service line for supplying electric current to farmers living adjacent to the aforesaid public highway" (R-11).

The position of the Company throughout this case has been that since under the laws of the State of Oklahoma its use of the highway constituted a proper highway use, it was unnecessary to either condemn a portion of the highway for its electric line under the last paragraph of *Section 3, Act of March 3, 1901*, if that were possible, or to make, as the Government contends, application to the Secretary of the Interior to use the highway.

Condemnation proceedings were never instituted since they were unnecessary, and in addition we know of no way in which the Company could successfully condemn a portion of a public highway. No application was ever made to the Secretary of the Interior for two reasons: First, because he has no control over the use of public highways in the State of Oklahoma; second, no act of Congress authorizes him to grant rights-of-way to electric companies over allotted land.

**Answer to the Government's Argument**

Opinions in this case were written by both the United States District Court for the Western District of Oklahoma, 37 *Fed. Supp.* (R-13) and by the Circuit Court of Appeals for the Tenth Circuit, 127 *Fed. Supp.*, 349 (R-25). The District Court's decision, is based upon the proposition that the grant authorized by Congress was for the opening and establishment of highways in accordance with the laws of the State; that under the laws of Oklahoma, the use by the Company was a proper highway use just as much as was the use thereof by automobiles, trucks, or horse-drawn vehicles, and that the Secretary of the Interior had no control whatever over uses of the highway which were proper under the law.

The Circuit Court of Appeals in addition to approving the basis of the District Court's decision, went further and answered adversely the contention of the Government to the effect that the Secretary of the Interior under the *Act of February* 15, 1901, 31 *Stat.* 790, 25 *U. S. C. Section* 959,

and the *Act of March* 4, 1911, 36 *Stat.* 1235, 1253, 43 *U. S. C., Section* 961, had authority to permit the crossing of allotments. It held that the only way in which the electric company could secure a separate right-of-way across the allotment in question, in the absence of a highway, was by condemnation under the laws of the State, *Section* 3, *Act of March* 3, 1901, 31 *Stat.* 1058, 25 *U. S. C., Section* 357.

**Reply to the Government's Proposition 1, Page 14, Government's Brief**

The Government contends that the *Act of February* 15, 1901, 43 *U. S. C., Section* 959, 31 *Stat.* 790, authorizes the Secretary to grant a permit for an electric line across an individual trust allotment. The statute does not so provide. It covers public lands, forests and *other reservations* of the United States. It next contends that under the *Act of March* 4, 1911, 43 *U. S. C., Section* 961, 36 *Stat.* 1253, the Secretary also has that right. Again the statute specifically applies only to public lands, national forests and *reservations* of the United States. There is then a proviso that such rights-of-way, if within a national park, national forest, military, Indian or other reservation, shall receive the approval of the Chief Officer of the Department under whose supervision or control such reservation falls.

The Circuit Court of Appeals held that neither Act granted to the Secretary any authority insofar as electric lines were concerned crossing Individual Indian allotments. Neither statute refers to allotments in severalty. The Government is, therefore, forced to contend that allotments are

included within the term "reservations" and cites one case as sustaining its view, *United States* v. *Celestine*, 215 U. S. 278. This Court therein had before it for consideration a criminal statute dealing with jurisdiction over crimes by Indians "within the limitation of any Indian reservation." The offense was committed within the limits of the Tulalip Indian Reservation in which the defendant and the murdered woman were the owners of patented land. The land was physically within the limits of the reservation. Since the reservation still existed, the fact that patents had been issued to land therein did not remove them from the reservation's physical limits, for the Court said:

> "When Congress has once established a reservation all tracts included within it remain a part of the reservation until separated therefrom by Congress."

If the allotment had not been within the physical limits of the reservation, then the jurisdiction of the court would have depended upon another provision of the Act. The fact of allotment within the limits of an established and existing reservation could not remove the land physically thereform.

In the instant case the Kickapoo Indian Reservation was established in the then Indian Territory, now Oklahoma, by executive order in 1883. *United States* v. *Reily*, 290 U. S. 33, 36. The tribe sold the reservation "without any reservation whatever" to the United States which agreed in consideration of the transfer to allot to every member of the tribe eighty acres in the tract ceded and to make a money payment. *Vol. 28, Stat. at Large, Ch. 203, Page 557,*

*et seq., Articles 1 and 2. Article 4* provides that title to the allotments should be held in trust. *Article 6* provides that wherever in the reservation ceded any religious society occupied a portion thereof, it could receive an *allotment* not to exceed one hundred sixty acres, and "such land shall not be subject to *homestead entry*." At page 560 the following appears:

> "The United States commissioners aforesaid and the Kickapoos have agreed on terms of *sale of their reservation*, except the commissioners insist on the Indians taking lands in allotment, while the Indians insist in taking an equal amount of land as a *diminished reservation*, the title to be held in common."

It will be observed from the foregoing that the parties recognized that the reservation was being sold and that the Indians were taking allotments; that the Indians were not favorably disposed toward the allotment idea and desired to retain in lieu thereof a "diminished reservation," title to which would be held in common. On page 561, the Secretary of the Interior, to whom the disputed question under agreement of the parties was submitted for decision, disposed of the matter as follows:

> "Now I, John W. Noble, Secretary of the Interior, and as said Secretary, do hereby decide that the Kickapoo Indians take their lands in *allotment* and *not to be held in common*, and I so direct."

The foregoing statute makes it clear beyond any doubt that there is a very decided distinction between an Indian reservation and an Indian allotment. The reservation of the Kickapoos ceased to exist upon its sale to the United States in 1894. The purpose of the sale was, of course, clear. It was

to secure for the United States more land which could be opened for homestead entry as was subsequently done in this instance.

As the Circuit Court of Appeals' opinion points out, Congress has recognized the distinction repeatedly between a reservation and an individual allotment. Take the statute under which the highway in question was opened, *Section 4, Act of March* 3, 1901, it provides that such highway grant may be made through any Indians reservation or through any lands which have been *allotted in severalty*. In the *Act of March* 11, 1904, easements were authorized for pipelines through Indian reservations and through *allotted lands*. *The Act of March* 3, 1901, provides for rights of way for telegraph and telephone lines through Indian reservations and *allotted lands*. It is then provided in regard to *allotted lands only*, that they may be condemned for any public purpose under the laws of the state or territory where located in the same manner as land owned in fee may be condemned. *Section* 3, *Act of March* 3, 1901.

*United States* v. *Minnesota*, 113 Fed. (2d) 770, as the Circuit Court below pointed out, recognized a distinction between allotments in severalty and reservations.

We are unable to follow the Government's reasoning as to the dire consequences which would ensue if its position is not sustained. If such permits are not authorized, the allottee is certainly protected, as no one could go on his land without first instituting condemnation proceedings if such were authorized by the state law.

Certain Decisions of the Interior Department are cited as evidencing an administrative construction to the effect that reservation "includes individual trust allotments within an Indian reservation" (P. 18, Government's brief). The trust allotment involved herein, however, is not within an Indian reservation, title to which passed to the United States before any allotment was ever made. The situation is more analogous to that dealt with in *Icicle Canal Co.*, 44 L. D.

**Answer to Government's Proposition 2, Page 20, Government's Brief**

Since the *Acts of February* 15, 1901, *and March* 4, 1911, have no application to the instant case, the Secretary of the Interior had no authority to grant the Company permission to cross the allotment. The Company, however, under *Section* 3, of the *Act of March* 3, 1901, 25 *U. S. C., Section* 357, 31 *Stat.* 1084, is vested with authority to condemn a right-of-way, 49 L. D. 396. There was no need, however, for it to exercise such right in view of the fact that under the law of Oklahoma its use of a highway is a property highway use, and there was a highway across the allotment. The Company had the right under the local law, subject to proper regulations protecting the rights of all highway users, to use the highway just as any other person in the state has a right to use the highways of the state for proper highway purposes.

The construction of the Congressional grant in question is, of course, to be determined by federal and not state law, that Congress has absolute control over public and

Indian lands and that Congress, had it deemed it wise, might condition or restrict highway grants in any manner it might desire, is not in controversy.

Under *Section* 4, *Act of March* 3, 1901, Congress has authorized the "opening and establishment of public highways in accordance with the laws of the state * * * in which the lands are situated."

This grant, it will be observed, is unrestricted, and by its express terms there is incorporated into the federal law the state law. The District court, rightly, therefore, stated what should constitute a proper use of the highway was "left to the determination of the State of Oklahoma."

The question narrows itself, therefore, down to what constitutes a proper use of the state highway. Will this use be determined by federal law or by state law? Since there is no federal law on the subject, it is, of course, to be determined by state law which, by adoption, is the federal law.

Congress must have realized that the laws of the several states in regard to highways were not uniform, and it therefore did not endeavor to specify their width, use, surfacing, *et cetera*, but expressly left all such matters to local law.

What is a public highway? Congress has said we must look to the laws of the respective states for that determination, and whatever under the laws of the state constitute a public highway, is the extent of the grant or dedication which Congress has authorized.

The Act does not grant a mere strip of land, it grants a public *highway* "in accordance with the laws of the State." The use to which a strip of land is devoted or is to be devoted, determines whether or not it is a public highway, a private road, or what not. The Government's position in reality is that the Act simply authorizes the grant of a strip of land, the use of which thereafter was to be subject to the control of the Secretary of the Interior. A mere strip of land, however, we submit, is not a public highway.

*Lawrence, et al.*, v. *Ewert*, 21 S. D. 580, 114 N. W. 709, 710.

The court judicially knows, we believe, that there are thousands of Indian allotments in Oklahoma, across many of which run public highways, and we believe the State would be greatly surprised to learn that all that the Act in question authorizes is for it to pay for various detached strips of land constituting portions of its highways, then bear the expense of their improvement as parts thereof, all for the purpose of having the use of such portions regulated by the Secretary of the Interior. If such is true, uniform regulation of the use of the highways of the state is an impossibility. The Government's error, we suggest, is in failing to distinguish between a mere strip of land or right-of-way and a *public highway*.

Some light, we believe, will be thrown upon this subject by a consideration of another Congressional Highway Act (*Act of July 26, 1866, Chapter 262, Section 8; 14 Stat., 253, U. S. C. A., Title 43, Section 932*):

"The right-of-way for the construction of highways over public lands not reserved for public use is hereby granted."

This Act is very general and no specific adoption of State law is contained therein, yet in so far as we can ascertain, the uniform construction of the Act has been that the incidents granted thereunder are governed by the laws of the State in which the lands are situated.

*Smith* v. *Mitchell*, 21 Wash. 536, 58 Pac. 667.

*Arizona Commercial Copper Co.*, v. *Gila County, et al.* 12 Ariz. 226, 100 Pac. 777, 778.

*Streeter* v. *Stalnaker*, 61 Neb. 205, 85 N. W. 47.

*Rose* v. *Bottyer*, 81 Cal. 122, 22 Pac. 393.

*Town of Rolling* v. *Emerick*, 122 Wis. 134, 99 N. W. 464.

*Kaloen* v. *Pilot Mount Township*, 33 N. D. 529, 157 N. W. 672, 675.

*Butte* v. *Mikoswitz*, 39 Mont. 350, 102 Pac. 593.

*State* v. *Tucker*, 237 Wis. 310, 296 N. W. 645.

In *Colorado* v. *Toll, Superintendent*, 268 U. S. 228, the regulation of the use of a highway established pursuant to the Act of 1886 was involved. The superintendent of a National Park subsequently established and traversed by the highways sought to exclude certain classes of automobiles therefrom, in other words to regulate a use proper under state law. This Court denied the superintendent's jurisdiction under the National Park Act and impliedly recognized that the control of the use of a highway established under the general highway Act of 1866 rested in the State.

The construction for which we contended is further fortified by numerous cases dealing with other Government grants, and the rule to be gathered therefrom is that in the absence of special restrictions or limitations, they are to be construed in accordance with the local law.

*Hardin* v. *Jordan*, 140 U. S. 371, 384.

*Oklahoma* v. *Texas*, 258 U. S. 574, 595.

*United States* v. *Oregon*, 295 U. S. 1.

*Brewer-Elliott Oil & Gas Co.*, v. *United States*, 260 U. S. 77.

The Act in question, we submit, constituted a dedication of the strip of land involved herein by the United States as a public highway in accordance with state law. After such dedication, it is not subject to Federal control so long as it is devoted to highway uses.

The Government's position, as we understand it, is that Congress adopted the state law only to a very restricted extent and that all proper highway uses under the local law are not included in the grant. No guide is suggested, however, for determining whether a particular use proper under state law is also to be deemed proper by the Secretary of the Interior. Congress certainly never intended this important matter to remain suspended subject merely to the whim of some official. Had Congress not been specific and had the Act in question been as general as the Act of 1886, since there is no federal law dealing with the use which highways granted are to be subject, under the cases we have heretofore referred to, the local law would govern.

While we have encountered some difficulty throughout this case in clearly following the argument of the Government, if it could be that the uses to which a highway granted under the Act of 1901 are to be determined by the uses to which highways were devoted at that time, such a position is answered by the case of

*Pacific Gas & Electric Co.* v. *United States*, 45 Fed. (2d) 708, 719.

Such a position is, of course, untenable as under it a highway established under the Act of 1866 could only be devoted to uses which were in existence then, and a highway opened under some act, say in 1800, would be still further limited in its uses.

We do not contend that the highway in question can be devoted by the state to any purpose other than a proper highway use or purpose. The law as to what uses a highway may be devoted is not uniform in all states. As to what it may be in states other than Oklahoma, we are not interested, as the Oklahoma law on the subject is settled and controlling. In Oklahoma an electric line is no more an additional servitude than is the use of a highway by a truck, automobile, horse and buggy or wheelbarrow.

*Nazworthy* v. *Illinois Oil Co.*, 176 Okla., 37, 54 Pac. (2d) 642.

*Jafek* v. *Public Service Co.*, 183 Okla. 32, 79 Pac. (2d) 813.

*Stanolind Pipe Line Co.* v. *Winford*, 176 Okla. 47, 54 Pac. (2d) 646.

*Okmulgee Producers & Manufacturers' Gas Co. v. Franks*, 177 Okla. 456, 60 Pac. (2d) 771.

We have devoted some space in this brief in answer to the Government's Proposition 1, since we felt it could be easily shown it was without substance. That proposition, however, has very little to do with this case, since even if the statutes in question did grant the authority contended for by the Secretary, the Company would not be required to secure a permit from him, as would have been the case had it desired to cross the allotment at some point other than on the public highway. It might have condemned under *Section 3 of the Act of March 3, 1901*. Because there is a statute authorizing condemnation, however, does not mean that the Company must institute condemnation proceedings in every instance, and that it cannot, under the local law, use the highway just as any other member of the public.

If we assume for the sake of argument only that the Company's use of the highway under Oklahoma law was not a proper highway use, the owners of adjoining land would be entitled to compensation only for subjecting their land to an additional servitude.

They could not compel the removal of the lines since the Company is a public utility vested under state law (*Title 27, Section 7, Okla. Stat. 1941 (appendix)*) and under the *Act of March 3, 1901, Ch. 832, Sec. 3, 31 Stat. 1084, 25 N. S. C., Section 357*, with the power of eminent domain.

It is stipulated:

"That said rural lines so constructed is a part and parcel of defendant's system of rural electrification

adjacent to and extending from the City of Shawnee, Oklahoma; used in supplying electricity to its customers."

*Peckham* v. *A. T. & S. F. Ry. Co.*, 88 Okla. 174, 212 Pac. 427.

*St. Louis & Santa Fe Ry. Co.* v. *Mann*, 79 Okla. 160, 192 Pac. 231.

*City of Seminole, et al.* v. *Fields, et al.*, 172 Okla. 187, 43 Pac. (2d) 64.

*Blackwell E. & S. W. Ry. Co., et al.* v. *Bebout*, 19 Okla. 63, 60, 91 Pac. 877.

*Vinson* v. *Oklahoma City*, 179 Okla. 590, 593, 66 Pac. (2d) 933.

*Oklahoma City* v. *Wells*, 185 Okla. 369, 370, 91 Pac. (2d) 1077.

It is respectfully submitted that the judgment of the lower court should be affirmed.

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## APPENDIX

Title 69, Sec. 57, Oklahoma Statutes, 1941:

PUBLIC UTILITIES IN STATE HIGHWAYS —LOCATION AND REMOVAL. The location and removal of all telephone, telegraph and electric light and power transmission lines, poles, wires and conduits and all pipe lines and tramways, erected or constructed, or hereafter to be erected or constructed upon or across any State Highway, insofar as the public travel and traffic is concerned, and insofar as the same may interfere with the construction or maintenance of any such highway, shall be under the control and supervision of the State Commissioner of Highways. The Commissioner, or some other officer selected by the Commissioner, shall serve a written notice upon the person or corporation owning or maintaining any such lines, poles, wires, conduits, pipe lines, or tramways, which notice shall contain a plan or chart indicating the places on the right-of-way at which such lines, poles, wires, conduits, pipe lines or tramways, may be maintained. The notice shall also state the time when the work of improving of said roads is proposed to commence, and shall further state that a hearing shall be had upon a proposed plan of location and matters incidental thereto, giving the place and date of such hearing. Immediately after such hearing the said owner shall be given a notice of the findings and and orders of the Commissioner and shall be given a reasonable time thereafter to comply therewith; provided, however, that the effect of any change ordered by the Commissioner shall not be to re-

move all or any part of such lines, poles, wires, conduits, pipe lines or tramways from the right-of-way of the highway. * * *

Title 27, Sec. 7, Oklahoma Statutes, 1941:

LIGHT, HEAT OR POWER BY ELECTRICITY OR GAS—EMINENT DOMAIN SAME AS RAILROADS. Any person, firm or corporation organized under the laws of this State, or authorized to do business in this State, to furnish light, heat or power by electricity or gas, or any other person, association or firm engaged in furnishing lights, heat or power by electricity or gas shall have and exercise the right of eminent domain in the same manner and by like proceedings as provided for railroad corporations by laws of the State. Laws 1917, ch. 230, p. 431, 3.

# SUPREME COURT OF THE UNITED STATES.

No. 171.—October Term, 1942.

The United States of America, Petitioner, vs. Oklahoma Gas & Electric Company. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit.

[February 15, 1943.]

Mr. Justice Jackson delivered the opinion of the Court.

The United States sued the Oklahoma Gas and Electric Company in the United States District Court asking a declaratory judgment that the Company illegally occupies with its pole line certain Indian land, and a mandatory injunction to terminate such occupation. The case turns on whether permission to the State of Oklahoma to establish a highway over allotted Indian land given under § 4 of the Act of March 3, 1901,[1] includes the right to permit maintenance of rural electric service lines within the highway bounds.

The United States at all relevant times held title to half of a quarter section of land in Oklahoma in trust for She-pah-tho-quah, a Mexican Kickapoo Indian allottee thereof; and since her death, for her heirs. The State of Oklahoma applied to the Secretary of the Interior "to grant permission in accordance with § 4 of the Act of March 3, 1901 (31 Stat. L. 1058, 1084), to open and establish a public highway" across the land in question. The highway width was 80 feet, and it extended 2577 feet on these lands, occupying 4.55 acres thereof. The State paid therefor $1,275 as compensation to the heirs of She-pah-tho-quah, and on January 20, 1928, the map of definite location was on behalf of the Secretary endorsed "Approved subject to the provisions of the Act of March 3, 1901 (31 Stat. L. 1058, 1084), Department regulations thereunder; and subject also to any prior valid existing right or adverse claim."

[1] 31 Stat. 1058, 1084, 25 U. S. C. § 311.

Section 4 of the Act of March 3, 1901, under which the application was specifically made and granted, provides:

"That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not yet been conveyed to the allottees with full power of alienation."

Apparently the Secretary has never issued a regulation applicable to this case. Cf. 25 Code of Federal Regulations § 261.1 *et seq.*

The highway was opened, and in 1936 the Oklahoma State Highway Commission, with statutory authority to act in the matter,[2] granted respondent the license under which it occupies a portion of the highway with its rural electric service line. The license is in terms revocable at will, provides for location of the poles 38 feet from the center of the highway, and requires all lines to be kept in good repair. The licensee assumes all liability for damage, and the license recites that it is "granted subject to any and all claims made by adjacent property owners as compensation for additional burden on such adjacent and abutting property."

The Secretary considered this use of the property not warranted by his permission to the State to establish a highway under § 4 of the Act of March 3, 1901. He demanded that the Company apply to him under the Acts of February 15, 1901 and March 4, 1911[3] for permission to maintain its lines and, when the Company refused, instituted this action. The District Court dismissed the complaint, and the Circuit Court of Appeals for the Tenth Circuit affirmed. 37 F. Supp. 347, 127 F. 2d 349. The question appeared important to the administration of Indian affairs, and we granted certiorari. — U. S. —.

It is not denied that under the laws of Oklahoma the use made of the highway by respondent, the State's licensee, is a lawful and proper highway use, imposing no additional burden for which a grantor of the highway easement would be entitled to compensation. But the Government denies that the Act of March 3, 1901,

[2] 69 Oklahoma Stat. (1941) § 57.

[3] 31 Stat. 790, 43 U. S. C. § 959; 36 Stat. 1235, 1253, 43 U. S. C. § 961. These are set out and discussed *infra*, p. 5 *et seq.*

providing "for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated," submits the scope of the highway use to state law. Its interpretation gives the Act a very limited meaning and substantially confines state law to governing procedures for "opening and establishment" of the highway.[4] It offers as examples of what is permitted to state determination, whether a state or county agency builds the road, whether funds shall be raised by bond issue or otherwise, and the terms and specifications of the construction contract. The issue is between this narrow view of the State's authority and the broader one which recognizes its laws as determining the various uses which go to make up the "public highway," opening and establishment of which are authorized.

We see no reason to believe that Congress intended to grant to local authorities a power so limited in a matter so commonly subject to complete local control.

It is well settled that a conveyance by the United States of land which it owns beneficially or, as in this case, for the purpose of exercising its guardianship over Indians, is to be construed, in the absence of any contrary indication of intention, according to the law of the State where the land lies.[4] Presumably Congress intended that this case be decided by reference to some law, but the Government has cited and we know of no federal statutory or common-law rule for determining whether the running of the electric service lines here involved was a highway use. These considerations, as well as the explicit reference in the Act to state law in the matter of "establishment" as well as of "opening" the highway, indicate that the question in this case is to be answered by reference to that law, in the absence of any governing administrative ruling, statute, or dominating consideration of Congressional policy to the contrary. We find none of these.

Apparently the Secretary has never sought to solve the problem of this case by an administrative ruling, and whether he might do do is a question which the parties have neither raised nor discussed, and upon which we intimate no opinion.

In construing this statute as to the incidents of a highway grant we must bear in mind that the Act contemplated a con-

[4] Grand Rapids & Indiana R. R. Co. v. Butler, 159 U. S. 87; Whitaker v. McBride, 197 U. S. 510; Oklahoma v. Texas, 258 U. S. 574, 595-596; see Brewer Oil Co. v. United States, 260 U. S. 77, 88-89; United States v. Oregon, 295 U. S. 1, 28; cf. Board of Commissioners v. United States, 308 U. S. 343.

veyance to a public body, not to a private interest. There was not the reason to withhold continuing control over the uses of the strip that might be withheld wisely in a grant of indefinite duration to a private grantee. It is said that the use here permitted by the State is private and commercial, and so it is. But a license to use the highway by a carrier of passengers for hire, or by a motor freight line, would also be a private and commercial use in the same sense. And it has long been both customary and lawful to stimulate private self-interest and utilize the profit motive to get needful services performed for the public. The State appears to be doing no more than that.

This is not such a transmission line as might endanger highway travel or abutting owners with no compensating advantage. It is a rural service line, and to bring electric energy in to the countryside is quite as essential to modern life as many other uses of the highway. The State has granted nothing not revocable at will, has alienated nothing obtained under the Act, has permitted no use that would obstruct or interfere with the use for which the highway was established, and has not purported to confer any right not subsidiary to its own or which would survive abandonment of the highway.

The interpretation suggested by the Government is not shown to be necessary to the fulfillment of the policy of Congress to protect a less-favored people against their own improvidence or the overreaching of others; nor is it conceivable that it is necessary, for the Indians are subjected only to the same rule of law as are others in the State, and then only by permission of the Secretary, subject to compliance with "such requirements as he may deem necessary."

Oklahoma is spotted with restricted lands held in trust for Indian allottees. Complications and confusion would follow from applying to highways crossing or abutting such lands rules differing from those which obtain as to lands of non-Indians. We believe that if Congress had intended this it would have made its meaning clear.

The Government relies, however, on the Acts of February 15, 1901, and of March 4, 1911, which it says require the Secretary's consent to cross Indian land with electric lines, regardless of the prior grant of permission for the highway. We believe that they are inapplicable to the land in suit, and therefore need not determine what would be their effect if they did apply.

The Act of February 15, 1901, "An Act Relating to rights of way through certain parks, reservations, and other public lands",[5] authorizes the Secretary of the Interior "to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes . . . to the extent of . . . not to exceed fifty feet on each side of the center line of such . . . electrical, telegraph, and telephone lines and poles . . .: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: *Provided further*, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provisions of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: *And provided further*, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."[6]

For all present purposes the Act of March 4, 1911 is the same as the above Act.[7]

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[5] H. R. Rep. No. 1850, 56th Cong., 1st Sess., indicates that the title of the Act, referring to public lands, was advisedly chosen.

[6] 31 Stat. 790, 43 U. S. C. § 959.

[7] 36 Stat. 1235, 1253, 43 U. S. C. § 961, providing:

"That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation

Neither statute makes any reference whatever to lands allotted to Indians in which the United States holds title in trust only to prevent improvident alienation. Their general tenor and particularly the second proviso of the Act of February 15, 1901, repel any inference that they were intended to govern the grant of rights of way over such lands. The effect of this proviso was to make any telephone or telegraph company which availed itself of the Act subject, as to Government business, to the rates set by the Postmaster General, and to make "all the . . . lines, property, and effects" of such a company subject to purchase by the Government at a value to be ascertained by an appraisal of five persons, two selected by the Postmaster General, two by the company, and one by the four so chosen.[8] It is rather difficult to believe that Congress ever intended to exact such conditions as part of the price of running a line across land in which the Government is interested only to the extent of holding title for the protection of an individual Indian allottee. It is particularly difficult in the context of the Acts, for if such were the intent it was defeated by giving an option to obtain the same rights by condemnation under state law and free of such restrictions. § 3 of the Act of March 3, 1901.[9]

The Government seeks to repel the force of these implications by asserting that the word "reservation" as employed in these Acts includes such land.

Section 4 of the Act of March 3, 1901 authorizes permission to run a highway "through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been con-

only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: *Provided*, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment."

See 40 L. D. 30, 31: "It will be observed that this act, which authorizes the granting of easements for electrical power transmission, and telephone and telegraph lines for stated periods not to exceed 50 years, follows, as closely as is possible in the accomplishment of its purposes, the language of the act of February 15, 1901 (31 Stat., 790), which authorizes mere revocable permits or licenses for such lines, and for other purposes. This act, therefore, merely authorizes additional or larger grants and does not modify or repeal the act of 1901, and should be construed and applied in harmony with it." See also, 46 Cong. Rec. 4014-4015.

[8] Comp. Stat. (1901) §§ 5266, 5267.

[9] 31 Stat. 1083-1084, 25 U. S. C. § 357.

veyed to the allottees with full power of alienation." The Act in § 3 also refers to "lands allotted in severalty," after already employing the word "reservation." If it included allotted lands without these words, Congress was employing language to no discernible purpose. We think Congress employed this language in the Act of March 3, 1901, to a purpose and with a clear distinction between reservations and allotted lands. Section 3 made allotted lands, but not reservations, subject to condemnation for any public purpose; § 4 made both reservations and allotted lands subject to highway permits by the Secretary. We think that the almost contemporaneous Act of February 15, 1901, in authorizing permits for electric companies through reservations, but not allotted lands, meant just what it said.

We have no purpose to decide anything more than the case before us. We do not say that "reservation" may never include allotted lands; all we hold is that if there is a distinction in fact, that distinction is carried into the Act. So we turn to the question whether these particular allotted lands were in fact within or without a "reservation."

She-pah-tho-quah, the allottee, was of the Kickapoo Tribe. In earlier times the Kickapoo Tribe occupied a treaty reservation in Kansas.[10] They became torn by internal dissentions. One faction remained on the old reservation in Kansas and received allotments there.[11] Others migrated, chiefly in 1852 and 1863, to Mexico and located on a reservation set apart for them by that Government. The Oklahoma Kickapoos comprise those who left Mexico, mostly in 1873, and returned to the United States. Ten years later a reservation was established for them by Executive Order in what was then Indian Territory, now Oklahoma. *United States* v. *Reily*, 290 U. S. 33, 35-36.

In 1891, however, these restless people negotiated a sale of their reservation to the Government "except the Commissioners insist on the Indians taking lands in allotment, while the Indians insist on taking an equal amount of land as a diminished reservation, the title to be held in common."[12] This disagreement was submitted to the Secretary of the Interior and he decided that the "Indians take their lands in allotment and not to

[10] Treaties of October 24, 1832, 7 Stat. 391; May 18, 1854, 10 Stat. 1078.
[11] Treaty of June 28, 1862, 13 Stat. 623.
[12] 27 Stat. 560.

be held in common."[13] The Kickapoo Tribe thereupon, on September 9, 1891 did "cede, convey, transfer, and relinquish, forever and absolutely, without any reservation whatever, all their claim, title and interest" to the reservation lands.[14] In consideration each of the Kickapoos, estimated at about 300 in number, was allotted 80 acres of such land with a per capita cash payment.[15] The transaction was ratified, and carried out on the part of the United States and the land acquired by the United States was opened to settlement.[16] Thus, the Kickapoo reservation was obliterated, the tribal lands were no more, and only individual allotments survived. We think it clear that the term "reservation" as used in the statutes in question had no application to such lands.

It is true that the opinion in *United States* v. *Reily*, *supra*, at 35, used the term "Kickapoo Reservation" to describe a region of Oklahoma as of a time subsequent to the dissolution. It is clear from the context of the opinion, however, that this term was used in a geographical and not a legal sense, much as one still speaks of the Northwest Territory. Congress has frequently referred to the "Kickapoo Reservation" in Kansas.[17] And it has often, usually in the same statute, referred to the Kickapoo Indians of Oklahoma; but never since the dissolution has it referred to a Kickapoo Reservation as existing in Oklahoma.[18] If descriptive nomenclature has any weight in this case, we think that the usage of Congress preponderates.

The dissolution of the reservation distinguishes the situation before us from that before the court relating to allotted lands within the Tulalip Reservation, *United States* v. *Celestine*, 215 U. S. 278; allotted lands within the Yakima Reservation, *United States* v. *Sutton*, 215 U. S. 291; those within the Colville Reservation, *United States* v. *Pelican*, 232 U. S. 442; and the many situations in which the Departmental rulings have held that the

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[13] 27 Stat. 561.

[14] 27 Stat. 557.

[15] 27 Stat. 558-559.

[16] 27 Stat. 562-563, 29 Stat. 868.

[17] 28 Stat. 909; 30 Stat. 590, 909, 943; 33 Stat. 213, 1074, 1254; 35 Stat. 80, 791; 36 Stat. 275, 1064; 37 Stat. 524; 38 Stat. 87, 590; 39 Stat. 123, 977; 40 Stat. 571; 41 Stat. 13, 66, 419, 523; 42 Stat. 57.

[18] 30 Stat. 77, 937; 33 Stat. 203, 1057; 34 Stat. 363, 1043; 35 Stat. 58, 802; 36 Stat. 280, 1069; 37 Stat. 529; 38 Stat. 93, 596; 39 Stat. 145, 982; 40 Stat. 578; 41 Stat. 20, 425, 1039, 1240; 42 Stat. 573, 1195; 43 Stat. 409, 708, 1160.

phrase "Indian, or other reservation" includes individual allotments.[19]

On the argument inquiry was made of counsel whether a consistent departmental practice existed in reference to grants of permission to electric companies to maintain lines along established highways. Both have called attention to a few instances of applications and grants or of assurances none were necessary said to favor their respective positions.[20] We find no consistent departmental practice which can be said to amount to an administrative construction of the Acts in question.

The judgment below is

*Affirmed.*

Mr. Justice BLACK and Mr. Justice DOUGLAS dissent.

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[19] 27 L. D. 421; 35 L. D. 550; 40 L. D. 39; 42 L. D. 419; 45 L. D. 563; 49 L. D. 396; 51 L. D. 41.

[20] The Government calls attention to permits given as to allotments within the Yakima and Colville reservations, which are inapplicable under our view of the case. Also to one permit to this respondent for a transmission line across a Kickapoo allotment within the boundaries of a previously authorized highway and one to it not within a highway. Respondent sets up correspondence in 1922, 1927, 1929 and 1930 claimed to indicate a contrary practice. None of this material is part of the record; and it is incomplete, and in no sense satisfactory establishment of a basis for any conclusion.